Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COEUR ALASKA, INC. *v.* SOUTHEAST ALASKA CONSERVATION COUNCIL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07–984. Argued January 12, 2009—Decided June 22, 2009*

In reviving a closed Alaska gold mine using a "froth flotation" technique, petitioner Coeur Alaska, Inc., plans to dispose of the resulting waste material, a rock and water mixture called "slurry," by pumping it into a nearby lake and then discharging purified lake water into a downstream creek. The Clean Water Act (CWA), *inter alia,* classifies crushed rock as a "pollutant," §352(6); forbids its discharge "[e]xcept as in compliance" with the Act, §301(a); empowers the Army Corps of Engineers (Corps) to "issue permits . . . for the discharge of . . . fill material," §404(a); and authorizes the Environmental Protection Agency (EPA) to "issue a permit for the discharge of any pollutant," "[e]xcept as provided in [§404]," §402(a). The Corps and the EPA together define "fill material" as any "material [that] has the effect of . . . [c]hanging the bottom elevation" of water, including "slurry . . . or similar mining-related materials." 40 CFR §232.2. Coeur Alaska obtained a §404 permit for the slurry discharge from the Corps and a §402 permit for the lake water discharge from the EPA.

Respondent environmental groups (collectively, SEACC) sued the Corps and several of its officials under the Administrative Procedure Act, arguing that the CWA §404 permit was not "in accordance with law," 5 U. S. C. §706(2)(A), because (1) Coeur Alaska should have sought a CWA §402 permit from the EPA instead, just as it did for the lake water discharge; and (2) the slurry discharge would violate the "new source performance standard" the EPA had promulgated under CWA §306(b), forbidding froth-flotation gold mines to dis-

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*Together with No. 07–990, *Alaska* v. *Southeast Alaska Conservation Council et al.,* also on certiorari to the same court.

charge "process wastewater," which includes solid wastes, 40 CFR §440.104(b)(1). Coeur Alaska and petitioner Alaska intervened as defendants. The District Court granted the defendants summary judgment, but the Ninth Circuit reversed, holding that the proposed slurry discharge would violate the EPA's performance standard and §306(e).

Held:

1. The Corps, not the EPA, has authority to permit the slurry discharge. Pp. 9–13.

(a) By specifying that, "[e]xcept as provided in . . . [§404,]" the EPA "may . . . issue permit[s] for the discharge of any pollutant," §402(a) forbids the EPA to issue permits for fill materials falling under the Corps' §404 authority. Even if there were ambiguity on this point, it would be resolved by the EPA's own regulation providing that "[d]ischarges of . . . fill material . . . which are regulated under section 404" "do not require [EPA §402] permits." 40 CFR §122.3. The agencies have interpreted this regulation to essentially restate §402's text, *ibid.,* and the EPA has confirmed that reading before this Court. Because it is not "plainly erroneous or inconsistent with the regulation," the Court accepts the EPA's interpretation as correct. *Auer* v. *Robbins*, 519 U. S. 452, 461. Thus, the question whether the EPA is the proper agency to regulate the slurry discharge depends on whether the Corps has authority to do so. If so, the EPA may not regulate. Pp. 9–11.

(b) Because §404(a) empowers the Corps to "issue permits . . . for the discharge of . . . fill material," and the agencies' joint regulation defines "fill material" to include "slurry . . . or similar mining-related materials" having the "effect of . . . [c]hanging the bottom elevation" of water, 40 CFR §232.2, the slurry Coeur Alaska wishes to discharge into the lake falls well within the Corps' §404 permitting authority, rather than the EPA's §402 authority. The CWA gives no indication that Congress intended to burden industry with the confusing division of permitting authority that SEACC's contrary reading would create. Pp. 11–13.

2. The Corps acted in accordance with law in issuing the slurry discharge permit to Coeur Alaska. Pp. 13–28.

(a) The CWA alone does not resolve these cases. Pp. 14–18.

(i) SEACC contends that because the EPA's performance standard forbids even minute solid waste discharges, 40 CFR §440.104(b)(1), it also forbids Coeur Alaska's slurry discharge, 30% of which is solid waste, into the lake. Thus, says SEACC, the slurry discharge is "unlawful" under CWA §306(e), which prohibits "any owner . . . of any new source to operate such source in violation of any standard of performance applicable to such source." Pp. 14–16.

(ii) Petitioners and the federal agencies counter that CWA §404 grants the Corps authority to determine whether to issue a permit allowing the slurry discharge without regard to the EPA's new source performance standard or §306(e)'s prohibition. Pp. 16–18.

(iii) The CWA is ambiguous on the question whether §306 applies to discharges of fill material regulated under §404. On the one hand, §306 provides that a discharge that violates an EPA new source performance standard is "unlawful"—without an exception for fill material. On the other hand, §404 grants the Corps blanket authority to permit the discharge of fill material—without mentioning §306. This tension indicates that Congress has not "directly spoken" to the "precise question" at issue. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842. P. 18.

(b) Although the agencies' regulations construing the CWA are entitled to deference if they resolve the statutory ambiguity in a reasonable manner, see *Chevron, supra,* at 842, the regulations bearing on §§306 and 404, like the CWA itself, do not do so. For example, each of the two principal regulations seems to stand on its own without reference to the other. The EPA's performance standard contains no exception for fill material, and it forbids any discharge of "process wastewater," including solid wastes. 40 CFR §440.104(b)(1). The agencies' joint regulation defining fill material includes "slurry or . . . similar mining-related materials," §232.2, but contains no exception for slurry regulated by an EPA performance standard. Additional regulations noted by the parties offer no basis for reconciliation. Pp. 18–20.

(c) In light of the ambiguities in the CWA and the pertinent regulations, the Court turns to the agencies' subsequent interpretation of those regulations. *Auer, supra,* at 461. The question at issue is addressed and resolved in a reasonable and coherent way by the two agencies' practice and policy, as recited in the EPA's internal "Regas Memorandum" (Memorandum), which explains that the performance standard applies only to the discharge of water from the lake into the downstream creek, and not to the initial discharge of slurry into the lake. Though the Memorandum is not subject to sufficiently formal procedures to merit full *Chevron* deference, the Court defers to it because it is not "plainly erroneous or inconsistent with the regulation[s]," *Auer, supra*, at 461. Five factors inform that conclusion: The Memorandum (1) confines its own scope to closed bodies of water like the lake here, thereby preserving a role for the performance standards; (2) guards against the possibility of evasion of those standards; (3) employs the Corps' expertise in evaluating the effects of fill material on the aquatic environment; (4) does not allow toxic compounds to be discharged into navigable waters; and (5) reconciles §§306, 402,

and 404, and the regulations implementing them, better than any of the parties' alternatives. The Court agrees with the parties that a two-permit regime is contrary to the statute and regulations. Pp. 20–23.

(d) The Court rejects SEACC's contention that the Regas Memorandum is not entitled to deference because it contradicts the agencies' published statements and prior practice. Though SEACC cites three such statements, its arguments are not convincing. Pp. 23–28.

(i) Although a 1986 memorandum of agreement (MOA) between the EPA and the Corps seeking to reconcile their then-differing "fill material" definitions suggests, as SEACC asserts, that §402 will "normally" apply to discharges of "suspended"—*i.e.,* solid—pollutants, that statement is not contrary to the Regas Memorandum, which acknowledges that the EPA retains authority under §402 to regulate the discharge of suspended solids from the lake into downstream waters. The MOA does not address the question presented by these cases, and answered by the Regas Memorandum, and is, in fact, consistent with the agencies' determination that the Corps regulates all discharges of fill material and that §306 does not apply to these discharges. Pp. 23–25.

(ii) Despite SEACC's assertion that the fill regulation's preamble demonstrates that the fill rule was not intended to displace the pre-existing froth-flotation gold mine performance standard, the preamble is consistent with the Regas Memorandum when it explicitly notes that the EPA has "never sought to regulate fill material under effluent guidelines," 67 Fed. Reg. 31135. If a discharge does not qualify as fill, the EPA's new source performance standard applies. If the discharge qualifies as fill, the performance standard does not apply; and there was no earlier agency practice or policy to the contrary. Pp. 25–26.

(iii) Remarks made by the two agencies in promulgating the fill regulation, which pledge that the EPA's "previou[s] . . . determination[s]" with regard to the application of performance standards "remain vali[d]," are not conclusive of the question at issue. The Regas Memorandum has followed this policy by applying the performance standard to the discharge of water from the lake into the creek. The remarks do not state that the EPA will apply such standards to discharges of fill material. Pp. 26–27.

(iv) While SEACC cites no instance in which the EPA has applied a performance standard to a discharge of fill material, Coeur Alaska cites two instances in which the Corps issued a §404 permit authorizing a mine to discharge solid waste as fill material. These permits illustrate that the agencies did not have a prior practice of applying EPA performance standards to discharges of mining wastes

that qualify as fill material. Pp. 27–28.

486 F. 3d 638, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined, and in which SCALIA, J., joined in part. BREYER, J., filed a concurring opinion. SCALIA, J., filed an opinion concurring in part and concurring in the judgment. GINSBURG, J., filed a dissenting opinion, in which STEVENS and SOUTER, JJ., joined.